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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION TO
CHANGE A WATER RIGHT NO. 40A
30009280 BY BRITT A. ROMAIN**

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**PROPOSAL
FOR
DECISION**

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on June 16, 2005, in Harlowton, Montana, to determine whether an authorization to change a water right should be issued to Britt A. Romain, hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. §85-2-402(2). All water rights involved in the change application were listed in the required public notice.

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APPEARANCES

Applicant Britt A. Romain appeared at the hearing by and through counsel Carol Brown. Britt A. Romain; David M. Schmidt, Water Rights Solutions, Inc.; and Scott Irvin, Regional Manager, Lewistown Water Resources Regional Office, Department of Natural Resources and Conservation (DNRC), were called to testify by the Applicant.

Objectors Kenneth and Virginia Olson appeared and testified by and through Virginia Olson. Objectors Rose and Steve Mitchell both appeared and testified in their own behalf. Objectors Mike and Bettie Teig appeared by and through Mike Teig.

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EXHIBITS

Applicant offered seventeen exhibits for the record. Objector Olson offered four exhibits; Objector Mitchell offered five exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1, A2, A3, A4, A7, A8, A9, A10, A11, A12, A14, A16, A17, A21, A28, A63, A64.

1 **Applicant's Exhibit A1** is a one-page sketch of Applicant's proposed pit.

2 **Applicant's Exhibit A2** consists of three drawings of the diversion works from the
3 proposed pit. The drawings are labeled Exhibit A2A (by G. Evertz, Mar-05), Exhibit A2B (by
4 Billings Precast), and Exhibit A2C.

5 **Applicant's Exhibit A3** is a three-page copy of a document entitled NATURAL
6 RESOURCES CONSERVATION SERVICE, CONSERVATION PRACTICE STANDARD, POND
7 SEALING OR LINING – BENTONITE SEALANT (NUMBER), Code 521C. This exhibit is the
8 same as Objector Mitchell's Exhibit M3.

9 **Applicant's Exhibit A4** consists of a two page March 4, 2005, letter from Dr. Thomas J.
10 Keck to Britt Romain with an attached page labeled Exhibit A-5.

11 **Applicant's Exhibit A7** is a copy of a one page February 22, 2005, letter from Robert N.
12 Bergantino, Hydrogeologist, to B[e]ritt Romain

13 **Applicant's Exhibit A8** is one-page consisting of copies of *PRIVATE ARTIFICIAL LAKE*
14 *OR POND LICENSE* Nos. 5-692 and 5-691 issued by the Department of Fish, Wildlife & Parks
15 on August 15, 1994.

16 **Applicant's Exhibit A9** is a copy of page one of five of a *CONSERVATION PROGRAM*
17 *APPLICATION /CONTRACT* signed June 3, 2003.

18 **Applicant's Exhibit A10** consists of copies of four documents entitled *STATUS*
19 *REVIEW* for GPCP 1994; GPCP 1996; GPCP 1997; GPCP Final.

20 **Applicant's Exhibit A11** is a one-page copy entitled *GREAT PLAINS CONSERVATION*
21 *PROGRAM, (GPCP), FISCAL YEAR 1994 ANNUAL REPORT*.

22 **Applicant's Exhibit A12** is a one-page copy entitled *LONG-TERM CONTRACT FOR*
23 *SCS COST-SHARE PROGRAMS* dated July 26, 1993.

24 **Applicant's Exhibit A14** is a one-page copy entitled *UPLAND GAME BIRD HABITAT*
25 *ENHANCEMENT PROJECT CONTRACT*, signed November 17, 1992 by Britt Romain.

1 **Applicant's Exhibit A16** is a one-page document entitled LABORATORY ANALYTICAL
2 REPORT dated July 9, 2004, listing the Client Sample ID as Well Combo, Water line.

3 **Applicant's Exhibit A17** consists of sixteen pages of one-page Laboratory Analytical
4 Reports or Laboratory Reports by Energy Laboratories, Inc., with dates ranging from March 16,
5 1995 to March 15, 2005.

6 **Applicant's Exhibit A21** consists of a copy of pages 12-1, 12-2, 12-3, and 12-4 from the
7 *MT IRR GUIDE, WATER SUPPLY FORECASTS, CHAPTER 12 WATER SUPPLY*
8 *FORECASTS.*

9 **Applicant's Exhibit A28** consists of two pages. One page is a copy of page one of
10 Permit to Appropriate Water No. 90342-40A issued to Britt A. Romain, with a priority date of July
11 5, 1994 at 3:45 p.m. The second page is a copy of an Authorization To Change Appropriation
12 Water Right Permit No. 90342-40A, issued to Britt Romain and signed October 21, 1997.

13 **Applicant's Exhibit A63** consists of a fourteen-page document entitled *Application to*
14 *Change a Permitted Water Right 40a-30009280, Water Right/Water Quality Analysis*, dated
15 May 26, 2005. The last page of the exhibit contains a hand-written correction made by Mr.
16 Schmidt at hearing.

17 **Applicant's Exhibit A64** is a large exhibit consisting of a portion of the map contained in
18 Applicant's Exhibit A63 entitled: *Britt Romain, Application to Change 30009280-40A, Objectors'*
19 *Property & Water Rights, T20N, R16E, Wheatland County, Montana.* The portion shown is the
20 Romain property. The exhibit contains several hand-written additions and corrections made at
21 hearing.

22 Objector Olson offered four exhibits. The Hearing Examiner did not accept and admit
23 into evidence any of Objector Olson's exhibits. The were rejected because they were not found
24 to be relevant.

1 The Hearing Examiner accepted and admitted into evidence Objector Mitchell's Exhibits
2 M1-M5.

3 **Objector Mitchell's Exhibit M1** is a six-page copy of the April 6, 2004 Environmental
4 Assessment prepared by Andy Brummond of DNRC.

5 **Objector Mitchell's Exhibit M2** consists of an 11" x 17" copy of an aerial photograph
6 with a legend stapled to it, and showing the proposed pit and the Mitchell property.

7 **Objector Mitchell's Exhibit M3** is a three-page copy of a document entitled *NATURAL*
8 *RESOURCES CONSERVATION SERVICE, CONSERVATION PRACTICE STANDARD, POND*
9 *SEALING OR LINING – BENTONITE SEALANT (NUMBER), Code 521C*. This exhibit is the
10 same as Applicant's Exhibit A3.

11 **Objector Mitchell's Exhibit M4** consists of copies of three one-page Laboratory
12 Reports, Water Analyses, prepared by Energy Laboratories, Inc., dated March 16, 1995. The
13 reports are for the Romain #1, House well; Romain #3, Deep Pond Well; and the #4, North Well.

14 **Objector Mitchell's Exhibit M5** is a copy of a Laboratory Analytical Report dated June
15 30, 2004, prepared by Energy Laboratories, Inc. The Client Sample ID is the Mitchel[I]
16 Reservoir.

17 **PRELIMINARY MATTERS**

18 Objector Larson and Objector Salazar did not appear at the hearing. The Hearing
19 Examiner finds Objector Larson and Objector Salazar in default because they did not appear at
20 the hearing. They are no longer considered parties. However, the information in their objection
21 form will remain a part of the record and may be used in reaching a decision in this matter.

22 At the hearing the Hearing Examiner notified the Parties that he was taking official notice
23 of the Notice of Completion due date for Permit No. 90342 40A found in the Department of
24 Natural Resources And Conservation (DNRC) Water Right records.

1 The Hearing Examiner, having reviewed the record in this matter and being fully advised
2 in the premises, does hereby make the following:

3 **FINDINGS OF FACT**

4 **General**

5 1. Application To Change A Water Right No. 40A 30009280 in the name of and signed by
6 Britt A. Romain was filed with the Department on January 6, 2004. (Department file)

7 2. The Environmental Assessment (EA) prepared by the Department for this application
8 was reviewed and is included in the record of this proceeding. The EA was completed on April
9 6, 2004. (Department file, testimony of Scott Irvin)

10 3. The water right being changed is Beneficial Water Use Permit No. 90342-40A issued to
11 Britt A. Romain on May 5, 1995. Beneficial Water Use Permit No. 90342-40A was issued to
12 appropriate ground water from three wells at a combined total flow rate of 300 gallons per
13 minute (gpm) up to a total volume of 305.93 acre-feet per year. The period of diversion is
14 January 1 to December 31, inclusive, of each year. The permitted purposes are not being
15 changed. The permitted purposes and periods of use remain at 1 acre-foot for domestic, 16.5
16 acre-feet for fish and wildlife, 0 acre-feet for recreation¹, 3.4 acre-feet for stock, all with year-
17 round periods of use; and 285.03 acre-feet for irrigation from March 15 through October 15,
18 inclusive of each year. (Department file, Exhibit No. A28, testimony of Scott Irvin)

19 4. Beneficial Water Use Permit No. 90342-40A has not yet been put to use at the full
20 permitted flow rate or volume. However, all three wells have been installed and some water has
21 been pumped and put to use under the Permit. The original project completion notice due date

¹ The uses listed on the permit include "300 gpm up to .00 ac-ft (01/01 – 12/31) for recreation." There is no explanation for the permitted zero volume for the recreation purpose on the permit.

1 was December 31, 1997. The date was extended until December 31, 2007 in December 2004.

2 (Department file, DNRC Water Right Records, testimony of Britt Romain, Exhibit No. A63)

3 5. An Authorization To Change Appropriation Water Right Permit No. 9034299-40A²,
4 signed October 21, 1997, was approved to add four additional places of use for stock tanks to
5 those originally permitted. (Department file, Exhibit No. A28)

6 6. The Applicant proposes to change his place of stock use and to add storage. The
7 proposed changes are: to add a 49.8 acre-foot storage pit in the NW¹/₄NW¹/₄SW¹/₄ of Section 12,
8 Township 10 North, Range 16 East, Wheatland County, Montana; and to add sixteen (16) stock
9 tanks to the place of use in the SW¹/₄SW¹/₄SW¹/₄, NW¹/₄NW¹/₄SW¹/₄, and SE¹/₄NW¹/₄SW¹/₄ of
10 Section 12; NW¹/₄NW¹/₄NW¹/₄, NW¹/₄NE¹/₄NE¹/₄, and SW¹/₄NW¹/₄SW¹/₄ of Section 13;
11 SE¹/₄SE¹/₄NW¹/₄ of Section 14³; NW¹/₄SW¹/₄SW¹/₄ of Section 15; NE¹/₄NW¹/₄NE¹/₄, and
12 SW¹/₄SE¹/₄SW¹/₄ of Section 22¹; NE¹/₄SW¹/₄SW¹/₄, NE¹/₄SW¹/₄SE¹/₄, SE¹/₄NW¹/₄NE¹/₄, and
13 NE¹/₄SE¹/₄NE¹/₄ of Section 23; NW¹/₄NE¹/₄NE¹/₄, and NE¹/₄NE¹/₄NE¹/₄ of Section 26; all in
14 Township 10 North, Range 16 East, Wheatland County, Montana, to allow intense grazing
15 management. The water diverted to storage will be at rates which do not exceed the permitted
16 amounts of 300 gpm up to 305.93 acre-feet, and will be used for all permitted uses granted on
17 Beneficial Water Use Permit No. 90342-40A. Applicant plans to use 100 gallon tanks when
18 sheep are grazed in the pasture and 1200 gallon tanks when cattle are grazed in the pasture.
19 The periods of diversion and use, purposes, and points of diversion will not change.

20 (Department file, testimony of Britt Romain)

² The original Authorization To Change Appropriation Water Right Permit No. 90342-40A was renumbered by the Department to 9034299-40A when it converted to its new water right record system.

³ The proposed location (place of use) of two stock tanks was changed in the February 25, 2005, Order Granting Motion To Amend Application. The changes were from SW¹/₄SW¹/₄NW¹/₄ of Section 14 to SE¹/₄SE¹/₄NW¹/₄ of Section 14, and from NW¹/₄SW¹/₄NE¹/₄ of Section 22 to SW¹/₄SE¹/₄SW¹/₄ of Section 22.

1 **Adverse Effect**

2 7. Applicant's storage pit is not intended to intercept any surface water flow. All water in the
3 pit will come from one or all of Applicant's three existing permitted wells. Applicant's plan for the
4 storage pit includes a ditch constructed along the up-hill edge of the pit to divert any surface
5 water around the pit (to either side) so it is not captured in the event surface runoff does occur
6 near the pit. Applicant's plan will prevent capture of overland flows in the pit, however, there is
7 free board in the pit to absorb any unexpected flow. (Testimony of Britt Romain, Exhibit A1)

8 8. Applicant will use stop valves on the storage pit inlet to prevent any overland flows or
9 overflows, and float valves on each stock tank to prevent overflows from the additional stock
10 tanks. Water will not be pumped to the stock tanks unless cattle or sheep are in the pasture
11 served by the stock tanks. There will be no waste by these proposed changes. (Department file,
12 testimony of Britt Romain)

13 9. Applicant's Beneficial Water Use Permit No. 90342-40A was conditioned to require
14 water measurement in the event the Department determines that diverting from this source is
15 adversely impacting existing water rights. The 1997 Authorization to Change requires
16 measurement of all water diverted, keeping records of all water diverted, and reporting the
17 measurements to the Department yearly. The more restrictive 1997 Authorization To Change
18 conditions must be attached to any change approved in this matter to ensure their purpose is
19 continued in this action. (Department file, Applicant's Exhibit No. A28)

20 10. With the exception of storage and added stock tanks, water use is substantially as
21 originally permitted. Water will be used in the same places of use as under original permit,
22 except for the added stock tanks, from the same points of diversion, for the same amounts,
23 purposes, and periods of use, and there is a plan or design to prevent capture of diffuse surface

1 water and to prevent waste. The proposed change will not adversely affect the use of existing
2 water rights of other persons. (Department file, testimony of Britt Romain, David Schmidt)

3 **Adequacy of Appropriation Works**

4 11. Applicant's three wells are installed and capable of delivering the 300 gpm permitted
5 flow rate to the proposed pit. The storage pit is not a dam with storage upstream. It is a pit or
6 hole in the ground. Applicant presented maps and drawings which show the pit size (250' by
7 500'), pipeline sizes and locations. The pit and irrigation system design are adequate to supply
8 low pressure sprinkler irrigation to the permitted place of use. The pit design will allow the
9 storage of 49.8 acre-feet of water. The pit design includes a control to maintain the level of
10 water in the pit and prevent overflows, and a settling tank to prevent any sediment from getting
11 into the irrigation system. A ditch constructed on the up-hill edge of the pit will prevent any
12 surface water from entering the pit. The proposed stock tank size will vary depending upon the
13 type of stock watered. Applicant plans to use 100 gallon tanks when sheep are grazed in the
14 pasture and 1200 gallon tanks when cattle are grazed in the pasture. The stock tanks will have
15 float valves to control flow to the tanks and to prevent overflows, and they will only be filled with
16 water at times when there are stock in the pasture. The water pumped from the wells is in a
17 pipeline from the time it leaves the well until it reaches the place of use except during the time
18 the water is stored in the pit. The means of diversion and operation of the appropriation works is
19 adequate. (Department file, testimony of Britt Romain, David Schmidt)

20 12. If seepage from the bottom of the pit is excessive, Applicant plans to line the pit with
21 bentonite (according to the specifications found in Exhibit Nos. A3, M3) to maintain seepage at
22 acceptable levels. However, the terms excessive and acceptable are not defined. The
23 construction is adequate if the pit is sealed or lined according to the specifications found in
24 Exhibit Nos. A3 and M3. (Department file, testimony of Britt Romain, David Schmidt)

1 **Beneficial Use**

2 13. Applicant has shown he will benefit by storing water year-round for the permitted
3 purposes of domestic, fish and wildlife, irrigation, recreation, and stock. Year-round diversion to
4 the pit will allow Applicant to pump throughout the year for irrigation rather than only from March
5 15 – October 15. The use of stored water for irrigation is limited to the period permitted of March
6 15 through October 15, inclusive, of each year. The addition of a storage pit is beneficial to the
7 Applicant and the stored water will only be used for the beneficial purposes on Beneficial Water
8 Use Permit No. 90342-40A. (Department file, testimony of Britt Romain, Scott Irvin)

9 14. The change in place of use to add stock tanks to allow intense grazing management of
10 Applicant's pastures does not change the underlying (stock water) purpose of the permitted
11 water. The proposed additional stock tanks is a beneficial use of water. (Department file,
12 testimony of Britt Romain)

13 **Possessory Interest**

14 15. Applicant has proven he has possessory interest, or the written consent of the person
15 with the possessory interest, in the property where the water is to be put to beneficial use.
16 Applicant owns the place of use. (Department file, testimony of Britt Romain)

17 **Water Quality Issues**

18 16. Valid objections relative to water quality were filed against this application. There were
19 no objections relative to the ability of a discharge permit holder to satisfy effluent limitations of
20 his permit. A water quality concern expressed was that the low quality Deep Pond Well water
21 being stored in the pit would seep from the pit and impact higher quality ground water or surface
22 water. Applicant and Objectors offered speculation on whether such seepage would occur and
23 whether such seepage would affect the water quality of the Objectors' surface water or ground
24 water. Objectors' properties are located down-gradient of the proposed pit. The flow direction of

1 groundwater is not well established in the record, however, Mr. Schmidt predicts a southerly
2 flow direction from the storage pit location towards a surface water drainage that flows through
3 Applicant's and some Objectors' land. The quality of water from Deep Pond Well (#2) by itself
4 has poor water quality in that it has a high salinity hazard and a medium sodium (Alkali) hazard.
5 But, when combined with water from Home Well (#3) and North Well (#4), sufficient dilution
6 occurs after mixing water in the pit so the combined water quality is suitable for irrigation and
7 livestock. There are circumstances that could occur where the water stored in the pit would not
8 be of suitable quality for Applicant's or Objector's uses. That is, under some circumstances a
9 high percentage of water from the Deep Pond Well (#2) would not be diluted by the better
10 quality water from the other two wells. Should this situation develop, this low quality water
11 should not be allowed to seep into the ground water. (Department file, testimony of David
12 Schmidt, Exhibit A64, Rose Mitchell, Steve Mitchell)

13 17. The pit is located in the Hell Creek beds. The Hell Creek Formation is a poor aquifer and
14 little seepage to the surface stream flow is expected by Mr. Schmidt. In addition, Mr. Schmidt
15 does not expect high seepage rates from the pit bottom to flow into the ground water. However,
16 Mr. Schmidt states that all ponds [pits] have some seepage. Applicant's plan is to line the pit
17 according to the specifications found in Applicant's Exhibit No. A3 (which is the same as
18 Objector Mitchell's Exhibit M3), Natural Resources Conservation Service, Conservation Practice
19 Standard, Pond Sealing or Lining – Bentonite Sealant, in the event excessive seepage occurs
20 after the pit is constructed. The amount of seepage from the proposed pit is not known, nor did
21 Applicant specify the conditions that would trigger lining the pit (that is, how much seepage is
22 excessive). (Department file, testimony of Britt Romain, David Schmidt, Exhibit Nos. A3, A63,
23 M3)

18. Standards for use of a bentonite sealant or liner to reduce seepage losses from ponds or impoundments have been written by the Natural Resources Conservation Service (NRCS), Exhibit Nos. A3 , M3. Sealing or lining the pit to will ensure the surface or ground water quality of a prior appropriator (including the Applicant) is not adversely affected by minimizing seepage from the pit. (Testimony of Brit Romain, David Schmidt, Rose Mitchell, Steve Mitchell, Exhibit Nos. A3, A4, A63, M3)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (2003).

2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. §85-2-408, or water use pursuant to Mont. Code Ann. §85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. §85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. §85-2-408 or Mont. Code Ann. §85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where

1 the water is to be put to beneficial use; if the change in appropriation right involves salvaged
2 water, the proposed water-saving methods will salvage at least the amount of water asserted by
3 the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not
4 be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of
5 a permit will not be adversely affected. Mont. Code Ann. §§85-2-402(2)(a) through (g).

6 3. The Applicant has proven by a preponderance of evidence that the use of existing water
7 rights of other persons or other perfected or planned uses or developments for which a permit or
8 certificate has been issued or for which a state water reservation has been issued will not be
9 adversely affected by the proposed change when the amount of all water diverted from the three
10 wells is measured, recorded, and reported to ensure the permitted amounts are not exceeded.
11 All of the Objectors referred to the current drought and lack of water available, and that issuance
12 of a change will diminish the water available for their use. Objectors presented no substantial
13 credible information or evidence that theirs or others' water use would be adversely affected by
14 adding a storage pit or adding more stock tanks (See Conclusion of Law No. 7 below). What
15 was presented were allegations regarding the use of the current permit rather than how the
16 proposed change would affect Objectors' water rights. The issues of physical availability, legal
17 water availability, and adverse effect from issuance of the Beneficial Water Use Permit and the
18 1997 Change Authorization were considered in the respective issuance proceedings. An
19 appropriator that has been granted a Beneficial Water Use Permit or change approval that has
20 not been perfected may change the point of diversion, place of use, purpose of use, or place of
21 storage by filing an application to change. See Mont. Code Ann. §85-2-402(12). The DNRC in
22 administrative rulings has held that a water right in a change proceeding of an unperfected
23 water use permit is defined by the amount granted and not the amount of water actually put to
24 beneficial use. See *In the Matter of Application for Change Authorization No. 4OR-G(P)–*
25 *066271-00 by Smith Farms, Inc.*, Final Order (1998), and *See In the Matter of Application for*

1 *Change Authorization No. 4OR-G(P)–066271-00 by Smith Farms, Inc.*, Cause No. CDV 99-28
2 Memorandum and Order, (First Judicial District Court, November 9, 1999). Mont. Code Ann.
3 §85-2-402(2)(a). See Finding of Fact Nos. 7, 8, 9, 10.

4 4. The Applicant has proven by a preponderance of evidence that the proposed means of
5 diversion, construction, and operation of the appropriation works are adequate when the pit is
6 sealed or lined to NRCS standards shown in Exhibit Nos. A3, M3 to minimize any seepage from
7 the bottom and sides of the pit. Objectors voiced concern that a failure of a storage facility of the
8 proposed size would be harmful, however, no evidence was provided to show how a pit or hole
9 in the ground could fail and release harmful volumes of water. Mont. Code Ann. §85-2-
10 402(2)(b). See Finding of Fact Nos. 11, 12.

11 5. The Applicant has proven by a preponderance of evidence that the proposed storage for
12 the uses permitted is beneficial, and the additional stock tanks are beneficial. The proposed
13 uses will not be changed from those permitted and are for uses which will benefit the Applicant.
14 Mont. Code Ann. §85-2-402(2)(c). See Finding of Fact Nos. 13, 14.

15 6. The Applicant has proven by a preponderance of evidence a possessory interest in the
16 property where water is to be put to beneficial use. Mont. Code Ann. §85-2-402(2)(d). See,
17 Finding of Fact No. 15.

18 7. Applicant has proven the water quality of other appropriators will not be adversely
19 affected by the proposed change if the storage pit is sealed or lined to reduce seepage
20 according to NRCS standards. Valid Objections were raised that the water quality of an
21 appropriator may be adversely affected by the proposed change. Objector Mitchell is concerned
22 the seepage of low quality water from the storage pit may adversely affect down-gradient
23 ground water and surface water which flows to Objector Mitchell. Objector Olson's objection
24 contained information alleging poor water quality and water quantity. However, Objector Olson

1 produced no evidence to show that the Applicant's proposed change would be the cause.
2 Instead, Objector Olson alleged that Applicant's use of his existing water use permit was the
3 cause of Objector Olson's poor water quality and water quantity. The Hearing Examiner
4 determined that evidence must relate to the **proposed change** – not the granted water right
5 being changed, to be relevant. See Mont. Code Ann. §§85-2-402(2)(a-f), (3). Objector Olson's
6 evidence was not relevant to this specific proceeding. Objector Salazar's water quality objection
7 was that authorization of the proposed change would make her well water too salty and her
8 livestock would suffer. However, Objector Salazar did not appear and present substantial
9 credible information showing how the proposed change would make her water salty. Applicant
10 proposes to line his pit if there is excess seepage from the pit. A statement from the Applicant is
11 not sufficient evidence to show the water quality of an existing appropriator will not be adversely
12 affected. See *In the Matter of Mineral Rights Unlimited, LLC Application No 411 111746*, Final
13 Order (2002). There is no substantial credible evidence in the record that shows if the pit is not
14 sealed or lined, there will be adverse effects to water quality. However, there is substantial
15 evidence in the record that shows lining the pit according to the specifications found in Exhibits
16 Nos. A3, M3 will minimize seepage from the pit such that water quality of an appropriator will not
17 be adversely affected. Mont. Code Ann. §§85-2-402(2)(f), (g). See, Finding of Fact Nos. 16, 17,
18 18.

19 8. The Department may approve a change subject to terms, conditions, restrictions, and
20 limitations it considers necessary to satisfy the criteria for changing a water right. The amount of
21 water diverted from the three wells must be measured to ensure the permitted amount of water
22 is not exceeded, and the proposed pit must be sealed or lined such that the specifications found
23 in Exhibit Nos. A3 and M3 are met or exceeded to ensure the water quality of a prior
24 appropriator is not adversely affected. Mont. Code Ann. §85-2-402(8). See Conclusion of Law
25 Nos. 3, 4, 7.

1 submit the records by November 30th of each year. The Regional Manager may also request
2 measurement records at other times during the year. Failure to submit reports may be cause for
3 revocation or modification of this authorization to change. The records must be sent to the
4 Lewistown Water Resources Regional Office. The appropriator shall maintain the measuring
5 device so it always operates properly and measures flow rate and volume accurately.

6 B. The Appropriator shall line the storage pit approved in this change with a bentonite liner
7 installed according to specifications found in the Natural Resources and Conservation Service,
8 Conservation Practice Standard, dated May 2002 and entitled *POND SEALING OR LINING –*
9 *BENTONITE SEALANT, (NUMBER) Code 521C*. The liner must be maintained according to the
10 same Conservation Practice Standard so water seepage from the storage pit is kept at a
11 minimum.

12 **NOTICE**

13 This Proposal for Decision may be adopted as the Department's final decision unless
14 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
15 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
16 argument. Exceptions and briefs, and requests for oral argument must be filed with the
17 Department by September 6, 2005, or postmarked by the same date, and copies mailed by that
18 same date to all parties. No new evidence will be considered.

19 No final decision shall be made until after the expiration of the above time periods, and
20 due consideration of *timely* oral argument requests, exceptions, and briefs.

Dated this 15th day of August, 2005.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 15th day of August 2005 by first class United States mail.

CAROL BROWN PLLC
303 CLARK ST
HELENA MT 59601

STEVE & ROSE MARY MITCHELL
PO BOX 127
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BRITT ROMAIN
HC 60 BOX 307
JUDITH GAP MT 59453

RICHARD LARSON
BOX 103
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CC:

DNRC WATER RESOURCES
LEWISTOWN REGIONAL OFFICE
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LEWISTOWN MT 59457-2020

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HEARINGS UNIT
406-444-6615

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF APPLICATION TO)	
CHANGE A WATER RIGHT NO. 40A)	
30009280 BY BRITT A. ROMAIN)	FINAL ORDER

The proposal for decision in this matter was entered on August 15, 2005. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Water Right Application No. 40A 30009280 is hereby **APPROVED**.

The Appropriator is authorized to add a 49.8 acre-foot storage pit in the NW¹/₄NW¹/₄SW¹/₄ of Section 12, Township 10 North, Range 16 East, Wheatland County, Montana, to store water for uses permitted by Beneficial Water Use Permit No. 90342-40A ; and to add sixteen (16) stock tanks to the place of use in the SW¹/₄SW¹/₄SW¹/₄, NW¹/₄NW¹/₄SW¹/₄, and SE¹/₄NW¹/₄SW¹/₄ of Section 12; NW¹/₄NW¹/₄NW¹/₄, NW¹/₄NE¹/₄NE¹/₄, and SW¹/₄NW¹/₄SW¹/₄ of Section 13; SE¹/₄SE¹/₄NW¹/₄ of Section 14; NW¹/₄SW¹/₄SW¹/₄ of Section 15; NE¹/₄NW¹/₄NE¹/₄, and SW¹/₄SE¹/₄SW¹/₄ of¹ Section 22; NE¹/₄SW¹/₄SW¹/₄, NE¹/₄SW¹/₄SE¹/₄, SE¹/₄NW¹/₄NE¹/₄, and NE¹/₄SE¹/₄NE¹/₄ of Section 23; NW¹/₄NE¹/₄NE¹/₄, and NE¹/₄NE¹/₄NE¹/₄ of Section 26; all in Township 10 North, Range 16 East, Wheatland County, Montana, for stock purposes. The

¹ The redundant phrase "of Section 22¹" found in the Proposed Order portion of the Proposal For Decision was removed.

stored water is to be diverted at rates which do not exceed the permitted amounts of 300 gallons per minute (gpm) up to 305.93 acre-feet, and is otherwise limited to the periods of diversion, periods of use, and permitted uses allowed on Beneficial Water Use Permit No. 90342-40A, and as changed by the 1997 Authorization To Change Appropriation Water Right No. 9034299-40A.

A. The appropriator shall install a measuring device approved by the Regional Manager at a point designated by the Regional Office to allow the flow rate and volume of water diverted to be recorded. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted including the period of time and shall submit the records by November 30th of each year. The Regional Manager may also request measurement records at other times during the year. Failure to submit reports may be cause for revocation or modification of this authorization to change. The records must be sent to the Lewistown Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. The Appropriator shall line the storage pit approved in this change with a bentonite liner installed according to specifications found in the Natural Resources and Conservation Service, Conservation Practice Standard, dated May 2002 and entitled *POND SEALING OR LINING – BENTONITE SEALANT, (NUMBER)* Code 521C. The liner must be maintained according to the same Conservation Practice Standard so water seepage from the storage pit is kept at a minimum.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for

judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this _____ day of September 2005.

Jack Stults, Administrator
Water Resources Division
Department of Natural Resources and
Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this _____ day of September 2005 by first class United States mail.

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